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In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL., PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of Labor's decision not to allocate funds from a lump-sum appropriation to training under the Trade Act of 1974 is committed to agency discretion by law and thus not subject to judicial review.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 746 F.2d 855. The district court's opinion (Pet. App. A18-A34) is reported at 570 F. Supp. 210.

JURISDICTION

The judgment of the court of appeals (Pet. App. A45-A46) was entered on October 23, 1984. On March 26, 1985, Chief Justice Burger granted an extension of time for filing a petition to and including June 10, 1985. The petition for a writ of certiorari was filed on June 10, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and five individual union members who claim that they, and other similarly situated union members, were improperly denied training benefits under the Trade Act of 1974 (Trade Act or Act), 19 U.S.C. (1976 ed. & Supp. V 1981) 2101 *et seq.* Petitioners alleged, inter alia, that in fiscal year 1982, applicants for training under the Act were denied benefits solely because funds were not made available by the Secretary of Labor (Secretary). They brought this action in the United States District Court for the District of Columbia seeking declaratory and injunctive relief from the Secretary's decision not to allocate funds for Trade Act training from the lump sum appropriated by Congress for various employment and training programs in fiscal year 1982 continuing resolutions.

2. The Trade Act provides benefits to workers adversely affected by competition from goods imported from foreign countries. See 29 U.S.C. (1976 ed.) 2271-2322. The principal benefit provided to workers is a trade readjustment allowance (TRA), which supplements state unemployment insurance benefits of workers who have lost their jobs due to import competition. 19 U.S.C. (1976 ed.) 2291-2294. In addition, the Secretary of Labor "may approve" training for an eligible worker, thereby entitling the worker "to have payment of the costs of such training paid on his behalf by the Secretary." 19 U.S.C. (Supp. V 1981) 2296(a)(1)(E)(1). A worker who timely applies for training approved under the Act is also eligible for an additional 26 weeks of TRA benefits, upon exhauston of the basic allowance of 52 weeks. 19 U.S.C. (1976 ed.) 2293(a)(2), 2293(b).[1]

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[1]The Trade Act's assistance provisions are administered by "cooperating state agencies" that administer state unemployment insurance laws, pursuant to agreements with the Secretary. 19 U.S.C. (1976 ed.)

During fiscal year 1982, Congress did not enact an appropriations bill for the Department of Labor. Instead, funding was provided under a series of four continuing resolutions appropriating funds on the basis of an annualized rate for fixed periods of time.[2] During this period, the Secretary instructed the state agencies to approve training under the Act only if "[s]ufficient funds allocated to pay the costs of such training are available," and expressly directed that "[a] state agency shall not approve training for a worker when funds to be expended for this purpose would exceed the amount allocated by the Secretary." U.S. Dep't of Labor General Administration Letter No. 4-82, at 7 (Nov. 13, 1981) (C.A. App. 36, 42).[3] Thus, the state agencies were to operate on a "funds available" basis and were not to approve any training the costs of which would exceed their fund allocations under the continuing resolution appropriations.

In the first continuing resolution, Congress designated a general "lump-sum" appropriation at an annual level of approximately $3.7 billion for the Department's various employment and training programs, including the Trade Act program. Of this amount, the only funds expressly earmarked for a particular program were approximately $2

2311(a), 2319(9) and (10). Although the cooperating state agencies determine eligibility for benefits, 19 U.S.C. (1976 ed.) 2311, the program is fully financed by the federal government. 19 U.S.C. (1976 ed.) 2313.

[2]Act of Oct. 1, 1981, Pub. L. No. 97-51, 95 Stat. 958 *et seq.*; Act of Nov. 23, 1981, Pub. L. No. 97-85, 95 Stat. 1098; Act of Dec. 15, 1981, Pub. L. No. 97-92, 95 Stat. 1183 *et seq.*; Act of Mar. 31, 1982, Pub. L. No. 97-161, 96 Stat. 22.

[3]"C.A. App." refers to the joint appendix filed in the court of appeals.

million for the National Commission for Employment Policy.[4] Act of Oct. 1, 1981, Pub. L. No. 97-51, § 101(a)(1) and (3), 95 Stat. 958-959. The second and fourth continuing resolutions extended the expiration dates of the earlier resolutions without providing any new directives regarding the allocation of funds. Act of Nov. 23, 1981, Pub. L. No. 97-85, 95 Stat. 1098; Act of Mar. 31, 1982, Pub. L. No. 97-161, 96 Stat. 22. The Secretary allocated funds from these general lump-sum appropriations among authorized employment and training programs other than the Trade Act program.

In the third continuing resolution, Act of Dec. 15, 1981, Pub. L. No. 97-92, 95 Stat. 1183 *et seq.*, Congress expressly

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[4]The first continuing resolution appropriated funds at the lower of the current rate or the appropriation foreseen in the Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriation Act of 1982, which at that point had passed the House but not the Senate. See Section 101(a)(1) and (3), 95 Stat. 958-959. The applicable spending levels were therefore taken from the House-passed version of the 1982 Act, which provided an appropriation of $3.671 billion, some $3.472 billion below the 1981 appropriation. See H.R. Rep. 97-251, 97th Cong., 1st Sess. 6 (1981). This Act provided in pertinent part as follows:

> For expenses necessary to carry into effect the Comprehensive Employment and Training Act of 1973, as amended, sections 236, 237, and 238 of the Trade Act of 1974, as amended (19 U.S.C. 2101), section 51 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 51), sections 210, 211 and 212 of Public Law 95-250, and the Veterans' Employment and Readjustment Act of 1972, as amended (38 U.S.C. 2003A), including the purchase and hire of passenger motor vehicles, the construction, alteration, and repair of buildings and other facilities, and the purchase of real property for training centers as authorized by the Comprehensive Employment and Training Act of 1973, as amended, $3,671,129,000 plus reimbursements, of which $2,001,000 shall be for the National Commission for Employment Policy: *Provided*, That no funds from any other appropriation shall be used to provide meal services at or for Job Corps centers.

H.R. 4560, 97th Cong., 1st Sess. 2-3 (1981).

provided $25 million for the Trade Act program.[5] The Secretary allocated this full amount to Trade Act training, job search, and relocation—thereby authorizing the state agencies to pay for training of as many qualified applicants as this funding would permit.

3. In this action petitioners asserted, inter alia, that they had been wrongly denied training cost reimbursements and weekly TRA benefits because of the Secretary's administration of the program on a "funds available" basis under the first two continuing resolutions and his allocation of only $25 million to the program under the third and fourth resolutions (Pet. App. A5-A6). Petitioners maintained that the Act contemplated that a portion of the appropriation would be expended on each of the programs mentioned therein so that each would be "carr[ied] into effect." Petitioners further argued that Congress intended that the Secretary allocate a portion of the overall employment and training appropriation, as well as the designated $25 million, to the Trade Act training program (Pet. 5-6.).

On cross-motions for summary judgment, the district court concluded that since Congress had not established training as an entitlement, the court could not require the Secretary to spend more than the amount made available (Pet. App. A26). The district court further held, however, that Congress had made available more than $25 million for Trade Act training and that the Secretary's decision to allocate no more than that amount to the program was an abuse of discretion subject to judicial review and correction (*id.* at A30-A31). The court therefore ordered the Secretary

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[5]Section 101(a)(6) (95 Stat. 1185) provided:

> In addition to any sums otherwise appropriated [under the terms of Section 101(a)(1) of the resolution] there is appropriated an additional sum of $25,000,000 which shall be made available for training, job search allowances, and relocation allowances, under sections 236, 237, and 238 of the Trade Act of 1974.

to make available for Trade Act training certain funds that had lapsed to the Treasury; to conduct de novo approval determinations; to reimburse, on a funds available basis, actual training expenditures of eligible claimants who were denied approval for training on the basis of insufficient funds; and to consider payment of extended TRA benefits to these individuals (*id.* at A37-A41).

4. The court of appeals vacated the order of the district court and directed the entry of judgment for the Secretary (Pet. App. A17). The court first held that since a lump-sum appropriation vests discretion in the recipient agency to distribute funds as it sees fit among some or all of the permissible objects of the appropriation (*id.* at A10), the Secretary was "at most, [under] a directive to obligate *all* of the $3.7 billion" to employment and training programs (Pet. App. A13) (emphasis in original). Applying this standard, the court concluded that the required obligation had occurred (*ibid.*).

Alternatively, the court held that "[e]ven if * * * the meaning of lump-sum appropriations were not as clear as it is" (Pet. App. A13), the absence of any entitlement to training under the Act, or any restriction on the allocation of funds in the continuing resolution deprived the court of jurisdiction to review the Secretary's allocation of funds (*id.* at A14). Relying on *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, (1971), the court reasoned that since the applicable continuing resolution "carefully specifie[d]" how $2,001,000 of the lump-sum appropriation was to be spent "but provide[d] no direction as to how the remainder was to be distributed," there was "no law to apply" upon review of the Secretary's allocation of funds (Pet. App. A14). The court rejected as "an archetypically political task," petitioners' invitation to establish a "reasonable distribution" requirement for the allocation of available funds among the competing social programs (Pet. App.

A13-A14). Under *Overton Park*, the court held, the Secretary's allocation decisions came within the Administrative Procedure Act's (APA's) exception to judicial review for "agency action * * * committed to agency discretion by law" (5 U.S.C. 701(a)(2); Pet. App. A14).

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners first assert a conflict between the court of appeals' decision holding unreviewable the Secretary's lump-sum funding allocation and decisions of this Court and of other courts of appeals that apply a "strong presumption of reviewability" to final agency actions (Pet. 10-12). The cited cases, however, are inapposite. Unlike the instant case, they either did not concern the APA exception to judicial review for decisions "committed to agency discretion by law" (5 U.S.C. 701(a)(2)), or they involved clear instances of "law to apply" in judging an agency's exercise of discretion.

Petitioners acknowledge (Pet. 10) that 5 U.S.C. 701(a)(2) precludes judicial review when the governing legislation is "drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971), quoting S. Rep. 752, 79th Cong., 1st Sess. 26 (1945). See also *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985), slip op. 8. They contend (Pet. 13-21), however, that the court below erred in finding there was "no law to apply" to the Secretary's funding allocation decision. This contention is without merit.

In *Heckler* v. *Chaney, supra*, this Court interpreted the exception to the APA's judicial review provisions for agency action "committed to agency discretion by law." 5 U.S.C. 701(a)(2). That case involved the reviewability of a Food and Drug Administration (FDA) decision not to take requested enforcement action under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.* The Court reaffirmed the applicability of the exception to the APA's judicial review provisions "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." Slip op. 8-9. Noting the "permissive" language of the governing statutory enforcement provisions and the fact that the statute "authorized" the FDA to take certain actions without giving any indication of when or how such actions should be taken, the Court concluded that those provisions committed complete discretion to the FDA to decide how and when the agency's authority thereunder should be exercised.

The Court in *Chaney* further held that an agency's decision not to take enforcement action is presumptively immune from judicial review under 5 U.S.C. 701(a)(2), unless Congress has indicated otherwise by providing statutory guidelines for the agency to follow in exercising its enforcement powers. Slip op. 11 (footnote omitted). In reaching this conclusion, the Court elaborated reasons for the "general unsuitability" for judicial review of agency decisions to refuse enforcement, citing considerations of agency expertise in assessing whether the action best fits the agency's overall policies and how best to order its priorities and devote its limited resources. Similar considerations pertain to the Secretary's funding allocation decisions in this case.

Like the statutory enforcement provisions in *Heckler* v. *Chaney, supra*, the Trade Act and the appropriation resolutions at issue in this case are "drawn so that a court would

have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, slip op. 8-9. As the court of appeals correctly concluded, neither the Trade Act provisions nor the appropriations language provides any standards for judging the Secretary's exercise of discretion in distributing funds from the general employment and training account among the permissible objects of the appropriation. The Trade Act's substantive provisions on training are entirely permissive; if the Secretary determines that certain conditions are met, "he *may* approve such training." 19 U.S.C. (Supp. V 1981) 2296(a) (emphasis added).[7] Similarly, the relevant appropriations merely provide an overall sum for several authorized programs and activities, without giving any indication of how the Secretary should distribute that sum. In short, there is no law to apply to the Secretary's exercise of discretion.

2. Although petitioners concede (Pet. 17) that "a large measure of discretion is left to the Executive in its allocation decisions," they nevertheless contend (Pet. 17-18) that the Secretary's decision not to allocate funds to the Trade Act training program is reviewable because it is subject to the congressional requirement that the funds be used to "carry into effect" specific programs. As the court below pointed out, however, this argument is belied by congressional understanding, as reflected in the legislative history of the provisions in issue, that "[a] lump-sum appropriation leaves it to the recipient agency * * * to distribute the funds among some or all of the permissible objects as it sees fit" (Pet. App. A10) (footnote omitted).

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[7]In view of this permissive language, the district court expressly concluded (Pet. App. A25-A26), and petitioners no longer dispute (Pet. App. A10-A11, n.5), that Congress did not establish training as an entitlement under the Act.

Reviewing the pertinent legislative history, the court of appeals found "at least a congressional realization, if not a congressional intent, that nothing would be expended for Trade Act training out of the $3.7 billion lump-sum appropriation" (Pet. App. A8). As reflected in the cited legislative history, an executive branch request for Trade Act training funds was not included in the appropriation reported by either the House or Senate committees, and proposals to amend the appropriation on the House and Senate floors for the purpose of specifically earmarking a portion of the lump-sum appropriation for Trade Act training were unsuccessful (*id.* at A8, A9). The court below also cited the remarks of representatives and senators who supported these unsuccessful amendments as indicative of congressional understanding that in the absence of specifically earmarked sums for this purpose, there would be no requirement to fund Trade Act training out of the lump-sum appropriation (*ibid.*).

Petitioners further argue (Pet. 11) that operative language in the third continuing resolution can be read to reflect an understanding that allocation of funds for Trade Act training had already been mandated.[8] But, as the court below observed, the cited language could as readily be interpreted to mean that Congress did not intend "to *preclude* the *discretionary* expenditure of some of the $3.7 billion for that purpose" (Pet. App. A12). The court of appeals correctly determined that the latter interpretation is "consistent with the ordinary understanding of lump-sum appropriations" (Pet. App. A 10, A12). Moreover, because the appropriations in question do not contain any explicit

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[8]Petitioners refer to language in the third continuing resolution that provides: *"In addition to any sums otherwise appropriated* there is appropriated an *additional* sum of $25,000,000 which shall be made available for training, job search allowances and relocation allowances. § 101(a)(6) of 95 Stat. 1185 (emphasis added).

congressional guidance concerning the distribution of funds among their authorized purposes, and because "the distribution of public funds among competing social program is an archetypically political task" (Pet. App. A13), the court below correctly held that the Secretary's decision not to allocate these generally appropriated employment and training funds to Trade Act training is unreviewable.

3. Contrary to petitioners' contention (Pet. 11), the decision below is silent as to the application of any presumptions and is entirely harmonious with an analysis employing a presumption of reviewability. Thus, factors such as those found determinative by the court of appeals — *i.e.*, the non-mandatory language of both the substantive statute and the lump-sum appropriations acts, and the unsuitability for judicial review of agency decisions involving considerations of agency expertise in distributing limited public funds among competing social programs — have been held by the D.C. Circuit itself to be sufficient grounds to preclude review even where a presumption of reviewability has been held to apply. See *Falkowski* v. *EEOC*, No. 764 F.2d 904, 911 (D.C. Cir. 1985) ("superiority of the agency as a decisionmaker on the questions at issue and the absence of any congressional pronouncements cabining the agency's discretion" were sufficiently weighty considerations to overcome the usual presumption of reviewability).[9]

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[9] *Falkowski* involved the Department of Justice's refusal to provide legal representation for an EEOC official in a civil rights action brought by a subordinate employee. The court of appeals had initially held that the decision not to provide representation was judicially reviewable based on certain "pragmatic considerations." 719 F.2d 470 (D.C. Cir. 1983). This Court vacated the judgment and remanded the case for further consideration in light of this Court's decision in *Heckler* v. *Chaney, supra.*

On remand, the court of appeals did not apply any presumption of *un*reviewability. The court held, however, that the presence of other factors equally important to the decision in *Chaney* overcame the usual

4. Nor is there any conflict between the court of appeals' holding of nonreviewability here case and the exercise of judicial review in the so-called "impoundment cases" cited by petitioners (Pet. 12, 15). As the court below correctly noted (Pet. App. A12-A13), those cases are distinguishable from this one in that they involved executive agencies' refusals to obligate funds in the face of specific congressional directives concerning the allocation or expenditure of appropriated funds. Here, there has been no refusal to obligate funds.[10] Moreover, in the instant case, Congress permitted, but did not require, the Secretary to provide training benefits, 19 U.S.C. (Supp. V 1981) 2296(a), and generally authorized, but did not direct, the allocation or expenditure of funds for this and other purposes. The "impoundment cases" are therefore inapposite.

In sum, Congress granted the Secretary broad, unrestricted discretion to determine the scope of the Trade Act training program within available appropriations and to allocate generally appropriated employment and training

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presumption of reviewability, rendering the action unreviewable. Because an agency's funding decision under a lump-sum appropriation has historically been regarded as the special province of the Executive Branch, the present case presents especially strong reasons for concluding that the Secretary's decision is not subject to judicial review.

[10]As the court of appeals noted (Pet. App. A13 & n.6), petitioners did not allege, nor did the evidence show, that the Secretary "impounded" funds by refusing or failing to obligate the sums appropriated. Rather, petitioners disputed the Secretary's decisions concerning the allocation of funds among the various authorized programs and the availability for Trade Act training purposes of certain obligated funds that had not been exhausted by the end of the fiscal year and were accordingly remitted to the Treasury (Pet. App. A19). Petitioners now suggest (Pet. 6-7 n.4; *id.* at Pet. 16 n.14) that the court below was factually mistaken in stating that the Secretary actually obligated the entire lump-sum appropriation. Because petitioners did not allege a failure to obligate, however, this factual determination is irrelevant to the question before the Court and does not warrant the Court's attention.

funds as he saw fit. The court of appeals therefore correctly held that the Secretary's allocation decision is committed to agency discretion by law, and not subject to judicial review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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